BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONNA M. SAMS	)	
Claimant	)	
VS.	)	
	)	Docket No. 162,076
SCHAFFERT GRIMES DRUG COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals an Award entered by Special Administrative Law Judge William F. Morrissey dated September 23, 1994. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

Claimant appeared by and through her attorney, Terry E. Beck of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Clifford K. Stubbs of Lenexa, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record and adopted the stipulations listed in the Award.

ISSUES

Respondent has requested the Appeals Board to review the following issues:

(1) Whether claimant's accidental injury arose out of and in the course of her employment with the respondent.

(2) Claimant's average weekly wage.

(3) Whether claimant is entitled to unauthorized medical expense reimbursement.

(4) The nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs and arguments of the parties, the Appeals Board finds as follows:

(1) Facts that are determinative of whether claimant suffered an accidental injury that arose out of and in the course of her employment are not in dispute. On the date of the accident, January 28, 1991, claimant was employed by the respondent as a part-time store clerk working from 4 p.m. to 9 p.m. during the weekdays. Claimant testified that on the night of the accident at approximately 8:50 p.m., Mr. Schaffert, respondent's owner, shut off part of the store lights which was a signal for the employees to clear out their cash registers and to prepare to leave work. After the cash registers were closed out, the claimant testified that she gathered up her personal belongings and went to the front door to wait for Mr. Schaffert to tell her and the other employees when they had permission to leave work. When Mr. Schaffert did give the employees permission to leave work, the claimant testified that she and the other employees left through the front door of the drug store and started across the parking lot to their cars. Claimant testified that the parking lot, on the night of the accident, was snow and ice covered making the parking lot surface very slick. Claimant testified that her car was parked in the parking lot by the light, approximately 40 feet from the front of the store. Claimant testified that the respondent had directed her to park by the lights because she and other employees had to leave work when it was dark. The claimant was approximately 3½ to 4 feet behind her car, she testified, when she slipped and fell onto the surface of the parking lot injuring her left shoulder. Claimant established that this occurred about 9 p.m. and that she was paid by the respondent that night until 9 p.m. Claimant also testified that when she left the respondent's store that night, she was not performing any work duties for the respondent.

Mrs. Nancy Schaffert and her husband, Wendall, were the sole owners and stockholders of the respondent corporation. Mrs. Schaffert was working the night of the accident and testified in this matter. Mrs. Schaffert testified that the time that claimant had fallen in the parking lot was 9 p.m. or after 9 p.m. Mrs. Schaffert established that there were a number of other retail stores that occupied the Gage Shopping Center where their drug store was located. She established that there was no designated place for employees or customers of certain retail stores to park in the parking lot. Mrs. Schaffert testified that neither she nor her husband had told their employees to park in a designated place in the parking lot. At Mrs. Schaffert's deposition, the lease agreement between the shopping center (owner) and the respondent (tenant) dated February 1, 1983 was admitted into evidence as an exhibit. The lease in the Rules and Regulations section contained a provision that the tenant and tenant's employees shall park their cars only in an area of the parking lot designated for that purpose. However, when asked about this provision, Mrs. Schaffert testified that “[w]e never did that.”

The subject lease agreement in Article IX - Parking and Common Use Areas and Facilities, Section 9.01. Control of Common Areas by Owner, was very clear that all automobile areas, including employees parking areas, shall at all times be subject to the exclusive control and management of owner.

The Administrative Law Judge found that the parking lot where the claimant fell was part of the employer's premises. Therefore, he found that since the accident occurred on the employer's premises that the accident and subsequent injuries received by the claimant arose out of and in the course of her employment with the respondent. Conversely, the respondent argues that the parking lot was not a part of its premises and, therefore, the accident did not arise out of and in the course of claimant's employment with the respondent. Since the accident occurred after the claimant was leaving work, claimant is subject to the "going and coming" rule which provides that injuries sustained after leaving work are not compensable unless the proximate cause of such injury is the employer's negligence. *See* K.S.A. 1990 Supp. 44-508(f).

The Appeals Board finds that in answer to the question of whether the claimant, in this case, was injured on the premises of the employer or is subject to the "going and coming" rule, is contained in the case of Thompson v. Law Offices of Alan Joseph, 256 Kan. 36, 883 P.2d 768 (1994). This Kansas Supreme Court case affirmed a Court of Appeals of Kansas decision in Thompson v. Law Offices of Alan Joseph, 19 Kan. App. 2d 367, 869 P.2d 761 (1994). The claimant in the Thompson case was injured on the way to work when she fell in the hallway as she exited the elevator on the floor where her employer's office was located. Claimant argued that she was on the employer's premises as soon as she parked her car across the street in a public parking lot where her employer furnished her with a parking space. Therefore, she was clearly on the employer's premises when she slipped. Claimant also argued that the area where she fell was part of the employer's premises. The only issue in that case, as is in the case now before the Appeals Board, is whether the claimant was injured on the employer's premises and, therefore, not subject to the "going and coming" rule contained in K.S.A. 1990 Supp. 44-508(f). In Thompson the Kansas Supreme Court accepted the Court of Appeals analysis of a series of Kansas Supreme Court decisions that narrowly construed the term "premises" in Kansas as a place controlled by the employer or a place where an employee may reasonably be during the time he or she is doing what a person so employed may reasonably do during or while the employment is in progress. 256 Kan. at 39. The Court went on to affirm the Court of Appeals decision holding that the public parking lot was not part of the employer's premises because there was no evidence that the employer controlled the public parking lot in any way other than paying for claimant's monthly parking fee. 256 Kan. at 44. The Court found that the claimant had not yet arrived at her employer's premises when she fell exiting from the elevator. The Court affirmed the district court's holding that the employer had no right to control the ingress or egress from the elevator onto the floor of the office building where the employer's office was located. 256 Kan. at 45-46.

Based on the whole evidentiary record, the Appeals Board finds that there is no evidence that the respondent, in this case, had any control over the parking lot where the claimant fell and was injured. On the contrary, the preponderance of the credible evidence proves that the owner, Gage Shopping Center, had the sole control and responsibility for the parking lot. The preponderance of the credible evidence also proves that the claimant was not performing her duties for the respondent at the time of her injury. The Appeals Board finds that since claimant was leaving work at the time of the accident she is subject to the "going and coming" rule contained in K.S.A. 1990 Supp. 44-508(f). Accordingly, the Appeals Board finds that claimant's injury is not compensable because the accident occurred after she had left work and did not occur on the employer's premises.

(2)(3)(4) Having found the claim in this case not compensable, the Appeals Board does not need to address the remaining issues in this order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated September 23, 1994, is reversed and the claimant, Donna M. Sams, is denied an award of compensation benefits against the respondent, Schaffert Grimes Drug Company, Inc., and its insurance carrier, Continental Casualty Company, for the personal injury she received on January 28, 1991.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Curtis, Schloetzer, Hedberg, Foster & Associates	
Transcript of Regular Hearing	$219.20
Correll Reporting Service	
Deposition of Nathan Shechter, M.D.	$ 73.00
Deposition of Wendall Schaffert	$ 68.50
Deposition of Nancy Schaffert	$ 92.00

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terry E. Beck, Topeka, KS
Clifford K. Stubbs, Lenexa, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director